IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA SMITH	:	CIVIL ACTION
	:	
v.	:	
	:	
THOMAS JEFFERSON UNIVERSITY	:	NO. 05-2834

MEMORANDUM

Padova, J. **June 29, 2006**

Plaintiff Barbara Smith has brought this action against Thomas Jefferson University alleging race and age discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq.*; 42 U.S.C. § 1981; the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, *et seq.*; the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. § 951, *et seq.*; and the Philadelphia Fair Practices Ordinance ("PFPO"), Phila. Code § 9-1101, *et seq*. Before the Court is Defendant's Motion for Summary Judgment. Argument on the Motion was held on June 27, 2006. For the reasons that follow, Defendant's Motion is granted.

I. BACKGROUND

Plaintiff is an African American female born on March 27, 1954. (Compl. ¶ 2; Dianne MacRae Decl. ¶ 9.) In January 2002, a friend of Plaintiff's informed her about employment opportunities at Thomas Jefferson University ("TJU"), and referred her to Florence Williams, the Director of Clinical Operations. (Pl. Dep. at 61-63.) Plaintiff was not offered the job for which she applied, but Williams alerted her to an opening for an administrative secretary in the Department of Surgery's Colon and Rectal Surgery Division ("the Division"). (Pl. Dep. at 63-64.) Plaintiff interviewed with three of the four surgeons who then worked in the Division, meeting with Dr.

Robert Fry, the chief of the Division; Dr. Gerald Isenberg; and Dr. Scott Goldstein, the program director for the residency program. (Pl. Dep. at 66-71.)

Plaintiff began work on January 28, 2002 as the Division's sole administrative secretary at an annual salary of $34,000. (Compl. ¶ 10; Pl. Dep. at 61; Def. Ex. D.) She joined an office that, as of the summer of 2002, had eight other non-physician employees: three patient registrars, two nurses, a surgery scheduler, a medical assistant, and a medical records clerk. (MacRae Decl. ¶ 7.) Plaintiff was the only African American employee, but three employees were older than Plaintiff, then aged forty-seven. (MacRae Decl. ¶¶ 7, 9.) Plaintiff's duties included maintaining the doctors' academic and administrative schedules and coordinating those schedules with the doctors' patient schedules; sorting the doctors' mail; filing administrative and personal correspondence; making the doctor's travel arrangements through TJU's travel department; handling accounts payable; and assisting Dr. Goldstein with the paperwork associated with the residency program. (Pl. Dep. at 72-108, 116.) Plaintiff had no direct interaction with patients. (Pl. Dep. at 75-81; MacRae Decl. ¶ 5; Pl. Resp. to Def. Statement of Undisputed Material Facts ¶ 8.) Plaintiff's performance was evaluated as outstanding by Dr. Goldstein. (Pl. Dep. at 136, 148.)

In the summer of 2002, two of the four doctors in the Division announced their departure from TJU and one nurse left along with them. (MacRae Dep. at 30; Def. Ex. E; Pl. Rep. Ex. A.) On August 13, 2002, the Administrator of the Department of Surgery, Dianne MacRae, sent a memo to TJU's Human Resources Department, titled "Elimination of Staff Position," which stated:

> On September 1, 2002, the Division of Colon and Rectal Surgery will change from a four-physician group practice to a two-physician group (Dr. Robert Fry and Dr. Najjia Mahmoud are going to the University of Pennsylvania). As a result of this change in Faculty staffing, I have analyzed the current staffing plan, and discussed with the Clinical

> Director of Operations and the surgeons the need to eliminate a position within the Division. It was decided unanimously by the group that the position to be eliminated is that of Administrative Secretary (Job Number 7504). The responsibilities of this position can be distributed among the remaining staff members, while still maintaining operational efficiencies. This change will also provide a financial savings to the division, which is at risk to be in a deficit situation due to the reduced professional services revenues.

(Def. Ex. E.) MacRae then met with Plaintiff and told her that she was being terminated. (Pl. Dep. at 187-89; MacRae Decl. ¶ 6.) Plaintiff asked MacRae whether her race or age played a role in the decision to terminate her, and MacRae explained to Plaintiff that she was being terminated for economic reasons. (Pl. Dep. at 174, 179, 193-94; MacRae Decl. ¶ 6.) MacRae also informed Plaintiff that she could contact Jessica Boyle, in TJU's Human Resources Department, if she identified an alternate position in which she was interested. (Pl. Dep. at 201-02.) Plaintiff's employment ended in September 2002 and her contacts with the Human Resources Department did not lead to another position. (Pl. Dep. at 202-06, 219-20.) Before Plaintiff left the Division, Dr. Goldstein instructed her to train one of the patient registrars, Mary Audrey Canterino, so that Canterino could assume certain of Plaintiff's responsibilities. (Pl. Dep. at 155-67; Canterino Dep. at 15-28.) Canterino had worked in the Division several months longer than Plaintiff and, prior to Plaintiff's termination, her primary responsibility had been to check patients in and out of their appointments and to schedule future appointments for medical services. (Pl. Dep. at 78-81; Canterino Dep. at 30-32; MacRae Decl. ¶¶ 7-8, Ex. B, D.) Canterino is white and in the summer of 2002, she was twenty-eight years old. (MacRae Decl. ¶ 8.)

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories,

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial responsibility of "identifying those portions of [the record] . . . which it believes demonstrate an absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The movant must then establish that it is entitled to judgment as a matter of law on the basis of the undisputed facts. See Fed. R. Civ. P. 56(c). Once the moving party has met its burden, the non-moving party must go beyond the pleadings and set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is "material" if it may affect the outcome of the matter pursuant to the underlying law. Id. An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

III. DISCUSSION

Plaintiff argues that Defendant's decision to fire her was motivated by race and age discrimination in violation of Title VII, § 1981, ADEA, PHRA, and PFPO. Plaintiff concedes that she does not have direct evidence of discrimination on the basis of her race and age. Absent direct evidence, courts apply the three-step burden-shifting analysis developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to each of the claims made by Plaintiff. See Jones v. School Dist. of Phila.,198 F.3d 403, 410 (3d Cir. 1999) (stating that Title VII, section 1981, and PHRA claims are analyzed under McDonnell Douglas); Tomasso v. Boeing Co., 445 F.3d 702, 704 (3d Cir. 2006) (explaining that McDonnell Douglas governs ADEA claims); Joseph v. Cont'l Airlines, Inc.,

126 F. Supp. 2d 373, 376 n.3 (E.D. Pa. 2000) (same for PFPO claims).

Under the McDonnell Douglas framework, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. Sarullo v. U.S. Postal Serv., 352 F.3d 789, 797 (3d Cir. 2003), cert. denied, 541 U.S. 1064 (2004). If the plaintiff establishes a prima facie case of discrimination, the burden of production shifts to the defendant "'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" Id. (quoting McDonnell Douglas, 411 U.S. at 802). If the defendant meets its burden, "the burden of production rebounds to the plaintiff, who must now show by a preponderance of the evidence, that the employer's explanation is pretextual." Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994).

A. Plaintiff's Prima Facie Case of Race and Age Discrimination

In order to establish a prima facie case of race and age discrimination, Plaintiff must demonstrate the following: (1) that she "is a member of a protected class"; (2) that she "is qualified for the position"; and (3) that she suffered an adverse employment action (4) "under circumstances that give rise to an inference of unlawful discrimination such as might occur when the position is filled by a person not of the protected class." Jones, 198 F.3d at 410-11 (quotation omitted). Where an employee is terminated during a reduction in force ("RIF"), the fourth element of the prima facie case becomes whether the employer retained employees not within the protected class.[1] Tomasso, 445 F.3d at 706 n.4 (citing Showalter v. Univ. of Pittsburgh Med. Ctr., 190 F.3d 231, 234-235 (3d

[1]In ADEA cases, a plaintiff need not meet the "unprotected class membership" standard, provided the plaintiff can show that the other workers who were retained were "sufficiently younger" than the plaintiff to create an inference of age discrimination, even if those other workers were also within the class protected by the ADEA, that is, they were older than forty. Showalter v. Univ. of Pittsburgh Med. Ctr., 190 F.3d 231, 236 (3d Cir. 1999); 29 U.S.C. § 631(a). This distinction is not relevant in the instant case because the employee whose retention Plaintiff claims indicates age discrimination was younger than forty.

Cir. 1999)); In re Carnegie Ctr. Assocs., 129 F.3d 290, 294-95 (3d Cir. 1997).[2] Ordinarily, as part of the fourth element, the plaintiff must identify retained employees who were "similarly situated" to the plaintiff, that is, they worked in the same area and in approximately the same position. See Anderson v. Consol. Rail Corp., 297 F.3d 242, 249-50 (3d Cir. 2002) (outlining requirements for prima facie case in a reduction in force matter brought under the ADEA). However, if a plaintiff cannot identify similarly situated employees because the plaintiff held a unique position within the employer's organization, that plaintiff is not barred from establishing a prima facie case of discrimination under McDonnell Douglas. Marzano v. Computer Science Corp., 91 F.3d 497, 510-11 (3d Cir. 1996) (refusing to impose legal requirements on plaintiffs, whose employers could classify them as "unique," that would prohibit those plaintiffs from demonstrating discrimination inferentially). Rather, the "unique" plaintiff may establish the fourth element of a prima facie case by demonstrating that the remaining responsibilities of her position were transferred to persons outside the protected class. Sosky v. Int'l Mill Serv., Inc., Civ. A. No. 94-2833, 1996 WL 32139, at *6 (E.D. Pa. Jan. 25, 1996), aff'd, 103 F.3d 114 (3d Cir. 1996) (citing Torre v. Casio, Inc., 42 F.3d 825, 830-31 (3d Cir. 1994)). See also Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 357 (3d Cir. 1999) ("When actually focusing on the prima facie case, we have repeatedly emphasized that the requirements of the prima facie case are flexible, and in particular that the fourth element must be relaxed in certain circumstances, as when there is a reduction in force.") (quotation omitted).

There is no dispute that Plaintiff, as an African American and a person over forty, is a

[2]"A work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company." Barnes v. GenCorp Inc., 896 F.2d 1457, 1465 (6th Cir. 1990). Though Plaintiff was the only employee terminated, two other positions were eliminated through voluntary resignations: one nurse accompanied Doctors Fry and Mahmoud to the University of Pennsylvania and another employee resigned soon afterwards. (MacRae Dep. at 30.)

member of two protected classes, that she was qualified for her position, and that her termination represented an adverse employment action. Defendant argues Plaintiff's prima facie case fails on the fourth element. Defendant asserts that because Plaintiff's administrative secretary position was unique within the Division, Plaintiff cannot demonstrate that other similarly situated employees were retained when her position was eliminated and hence, she cannot show that she was terminated under circumstances that give rise to an inference of unlawful discrimination. The Court rejects Defendant's contention that plaintiffs who hold unique positions within their employers' organizations cannot demonstrate discrimination other than through direct proof. See Marzano, 91 F.3d at 510-11. Plaintiff's submissions indicate that, after Plaintiff left the Division, Canterino assumed most of Plaintiff's responsibilities. Canterino, in addition to performing her job functions as a patient registrar, began coordinating the doctors' academic and administrative schedules, submitting the doctors' travel reimbursements, managing accounts payable, and handling the paperwork and interviews for the residency program. (Canterino Dep. at 17-27.) The Court finds that Plaintiff has pointed to sufficient submissions to support the proposition that Defendant assigned her job responsibilities to an employee not in her protected classes and that such a showing would be sufficient to establish a prima facie case of race and age discrimination.

B. Defendant's Articulated Nondiscriminatory Rationale

Where a plaintiff has established a prima facie case of age and race discrimination, the burden of production shifts to the defendant to articulate legitimate nondiscriminatory reasons for the adverse employment action. The defendant's burden at this second step of the McDonnell Douglas framework is "relatively light," and the defendant need only "introduc[e] evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the

unfavorable employment decision." Fuentes, 32 F.3d at 763. "The employer need not prove that the tendered reason actually motivated its behavior, as throughout this burden-shifting paradigm the ultimate burden of proving intentional discrimination always rests with the plaintiff." Id. (citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

Defendant contends that Plaintiff was terminated because MacRae, as the Administrator of the Department of Surgery, in consultation with Florence Williams and Doctors Isenberg and Goldstein, decided to eliminate the salary costs associated with having an administrative secretary within the Division of Colon and Rectal Surgery. (MacRae Dep. at 12-18, 25-31; MacRae Decl. ¶ 5.) MacRae needed to compensate for the decline in revenues the Division was experiencing due to the departure of two of its four doctors for the University of Pennsylvania. (MacRae Dep. at 12-18, 25-31; MacRae Decl. ¶ 5.) According to Defendant, MacRae chose to eliminate Plaintiff's position, as opposed to other staff positions, because Plaintiff was the only staff member who had no patient contact; therefore, the continuity and quality of patient care would be affected least if her position were the one eliminated. (MacRae Dep. at 54-57; MacRae Decl. ¶ 5.) Doctors Isenberg and Goldstein further supported Plaintiff's elimination because they felt the majority of her administrative work assisted the chief of the Division, Dr. Fry, and since he was one of the doctors leaving, many of Plaintiff's services were no longer necessary. (Pl. Dep. at 123; Canterino Dep. at 32-33; MacRae Dep. at 54.) The Court concludes that Defendant has met its intermediate burden of articulating a facially legitimate, nondiscriminatory reason for Plaintiff's termination, namely that economics compelled it to make a RIF and Plaintiff's position was least necessary to the ongoing operations of the Division.

C. Pretext

Once a defendant answers a plaintiff's prima facie case with legitimate, non-discriminatory reasons for its actions, the plaintiff must point to "some evidence from which a factfinder could reasonably conclude that the defendant's proffered reasons were fabricated (pretextual)," and therefore a ruse for discrimination. Fuentes, 32 F.3d at 764. In order to create a genuine issue of material fact as to whether the proffered reasons are pretextual, the plaintiff must "'demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act for [the asserted] non-discriminatory reasons.'" Tomasso, 445 F.3d at 706 (alteration in original) (quoting Fuentes, 32 F.3d at 765).

Plaintiff argues that Defendant's proffered reasons are weak because they do not adequately explain why, even if a position had to be eliminated for economic reasons, Plaintiff was terminated. Plaintiff asserts that her twenty years of experience in the healthcare industry, which included patient contact, would have made her a candidate for several positions with in the Division and maintains that Defendant should have to justify why Plaintiff was not asked to absorb the duties of another employee. (See Pl. Dep. at 26-49; Pl. Ex. F.) Plaintiff further contends that Defendant cannot feasibly maintain that three patient registrars were required to handle a reduced practice. She emphasizes that, by contrast, a number of her job duties were clearly intended to survive the elimination of her position because she trained Canterino on them and thus, her role was necessary to the Division's ongoing operations. (Canterino Dep. at 18-26.)

The United States Court of Appeals for the Third Circuit instructs that "pretext is not

shown by evidence that 'the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.'" Kautz v. Met-Pro Corp., 412 F.3d 463, 467 (3d Cir. 2005) (quoting Fuentes, 32 F.3d at 765). See also Tomasso, 445 F.3d at 706 (stating that a plaintiff must "present evidence contradicting the *core facts* put forward by the employer as the legitimate reason for its decision") (emphasis in original) (quotation omitted). In addition, a court does "not sit as a super-personnel department that reexamines an entity's business decisions." McCoy v. WGN Cont'l Broad. Co., 957 F.2d 368, 373 (7th Cir. 1992) (quotation omitted). See also Keller v. Orix Credit Alliance, 130 F.3d 1101, 1109 (3d Cir. 1997) (en banc) ("'The question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is [discrimination].'" (alteration in original) (quoting Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir.1996)). Plaintiff does not dispute that she was the only staff member in the Division whose position did not involve direct patient contact. Plaintiff's efforts to establish that she was nonetheless qualified to hold a position involving patient contact or to downplay the relative importance of the patient registrars who did have patient relationships do not undermine Defendant's contention that a concern for the quality and continuity of patient care was its honest motive in selecting Plaintiff's position for termination. Rather, Plaintiff is merely attacking Defendant's business judgment in implementing its RIF. The Court concludes that Plaintiff has not demonstrated sufficient weaknesses in Defendant's proffered nondiscriminatory rationale for Plaintiff's termination to create a genuine issue of material fact as to pretext. See Anderson, 297 F.3d at 250 (noting that the ADEA is not a bumping statute).

Plaintiff also argues that Defendant failed to comply with its own internal policy governing

RIFs, thereby creating a significant issue of material fact as to the true reasons for Plaintiff's termination. Defendant's "Employee Relations - Reduction in Work Force" Policy states:

> Management and administrative personnel will attempt to identify the employees to be displaced as specifically and as early as possible to allow maximum time for placement in other positions, where appropriate. Reductions in force shall be in accordance with skill, physical fitness and ability to perform the job. If two or more employees have equal skill and ability, University seniority shall be used to determine the order, and layoff shall begin with the least senior employee. Wherever possible probationary, temporary and part-time employees within a department will be laid off before regular full-time employees.

(MacRae Decl. Ex. E.) Plaintiff contends that the August 13, 2002 memo from MacRae to TJU's Human Resources Department shows that Defendant made no attempt to conform to its own policy. Plaintiff relies upon the fact that the memo does not specifically state that Plaintiff's skills, physical fitness, and ability to perform the jobs remaining in the Division were considered before the decision to terminate her was made. Plaintiff insists that if her skills had been assessed, Defendant would have been forced to recognize that her value to the Division was superior to Canterino's because she had many more years of experience in the healthcare industry. (Canterino Dep. at 29; Pl. Ex. F.) Plaintiff maintains that Defendant's failure to follow its own written policy casts significant doubt upon the legitimacy of its actions. See Poff v. Prudential Ins. Co. of Am., 911 F. Supp. 856, 861 (E.D. Pa. 1996) (noting that "[a]n employer's failure to follow procedure assists a plaintiff's case [of employment discrimination] if such violation, in conjunction with other evidence (such as evidence showing that the policy was disparately applied), tends to show that the proffered reason [for an adverse employment action] is not credible") (citations omitted).

Defendant asserts that it did evaluate the skills and abilities demonstrated by Plaintiff in

her role as administrative secretary and that the August 13, 2002 memo's conclusion that the responsibilities of Plaintiff's position could "be distributed among the remaining staff members, while still maintaining operational efficiencies" reflects that the outcome of that determination was that the skills and abilities evidenced by Plaintiff were less essential to the ongoing operations of the Division than those evidenced by other employees. Canterino, for example, was deemed more valuable to the Division because, in her role as a patient registrar, she had developed relationships with the Division's patients and those patients had become accustomed to arranging for their medical care through her. (Canterino Dep. at 9-10, 30-31; MacRae Dep. at 34, 55-56.) Canterino also knew how to operate IDX, the Division's patient scheduling and billing system. (MacRae Dep. at 55-56, 64.) Plaintiff, by contrast, did not have experience working with patients in the Division's clinical area. In addition, she would have required a week's worth of training to become familiar with IDX, whereas she reportedly trained Canterino in her responsibilities in approximately six hours. (MacRae Decl. at 55-56; Canterino Dep. at 34.) The Court finds that MacRae's failure to include a more detailed explanation of why she chose to terminate Plaintiff in her memo to the Human Resources Department is not evidence that the decision did not comply with TJU's RIF policy. The Court notes that even if Defendant had judged Plaintiff's skills and abilities to be equal to Canterino's, under TJU's RIF policy, Canterino would have been the one retained because she joined the Division several months before Plaintiff and had seniority. The Court concludes that Plaintiff has not demonstrated inconsistences in Defendant's proffered nondiscriminatory rationale for Plaintiff's termination that create a genuine issue of material fact regarding pretext.

Plaintiff asserts finally that Dr. Goldstein made comments about ethnic minorities during

the course of her employment. Plaintiff contends that these comments suggest that the environment, in which the decision was made to eliminate her position, was a discriminatory one, at least with regards to race, and that Defendant's proffered reasons for terminating Plaintiff are a disguise for racial animus. Plaintiff has recalled but one specific ethnic comment made by Dr. Goldstein; it involves Dr. Goldstein calling an Asian medical resident "rat boy" and teasing him about eating rats. (Pl. Dep. at 127.) Plaintiff describes the comment as being made in response to a statement from the resident that different types of meat were eaten in his home country than in the United States. (Pl. Dep. at 127-28.) When asked during her deposition what comments Dr. Goldstein made to her that she found inappropriate, Plaintiff replied, "I don't remember exactly," and then later admitted that she was not contending that Dr. Goldstein made inappropriate comments about her race.[3] (Pl. Dep. at 129, 131, 133.) The Court concludes that an isolated comment, that was uttered by one of the people involved in the decision to terminate Plaintiff, that was not addressed towards Plaintiff, and that was not derogatory towards members of her race, does not cast enough doubt upon the rationale advanced by Defendant as the legitimate reason for its decision to terminate Plaintiff to create a genuine issue of material fact as to Defendant's motivations. See Hook v. Ernst & Young, 28 F.3d 366, 375-76 (3d Cir. 1994) (stating that offensive remarks, which were made by a decisionmaker during conversations that "had nothing to do with" the plaintiff's job, were insufficient to show an adverse employment decision was tainted by bias). Consequently, the Court holds that Plaintiff has not submitted sufficient evidence to create a genuine issue of material fact regarding whether Defendant's proffered reasons for her

[3]Plaintiff thereby recanted an earlier comment that Dr. Goldstein made jokes "about the black race." (Pl. Dep. at 126.)

termination were pretextual. The Court, therefore, grants Defendant's Motion for Summary Judgment with respect to Plaintiff's claims of race and age discrimination under Title VII, § 1981, ADEA, PHRA, and PFPO. An appropriate order follows.

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O R D E R

AND NOW, this 29th day of June, 2006, upon consideration of Defendant's Motion for Summary Judgment (Doc. No. 10), all submissions filed in regards thereto, and the Argument held on June 27, 2006, **IT IS HEREBY ORDERED** that said Motion is **GRANTED**. **JUDGMENT** is hereby entered in favor of Defendant and against Plaintiff.

BY THE COURT:

/s/ John R. Padova, J.
John R. Padova, J.